

E-Filed 11/26/12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL SANDIGO,
Plaintiff,

v.

G.D. LEWIS, et al.,
Defendants.

No. C 12-0085 RS (PR)

**ORDER SETTING BRIEFING
SCHEDULE;**

**ORDER DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**

**ORDER DENYING MOTION FOR
LEAVE TO FILE AN AMENDED
COMPLAINT**

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. Defendants have been served with the complaint.

BRIEFING SCHEDULE

1. This order sets a briefing schedule. Defendants are directed to file a dispositive motion or notice regarding such motion on or before February 26, 2013, unless an extension is granted. The Court further directs that defendants are to adhere to the new notice

provisions detailed in Sections 2.a and 10 of the conclusion of this order.

2. No later than ninety (90) days from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the complaint found cognizable.

a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than forty-five (45) days from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the

1 defendant's declarations and documents and show that you have in fact exhausted your
2 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
3 appropriate, may be granted and the case dismissed.

4 b. In the event defendants file a motion for summary judgment,
5 the Ninth Circuit has held that the following notice should be given to plaintiffs:

6 The defendants have made a motion for summary judgment by which they
7 seek to have your case dismissed. A motion for summary judgment under Rule
8 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
9 Rule 56 tells you what you must do in order to oppose a motion for summary
10 judgment. Generally, summary judgment must be granted when there is no
11 genuine issue of material fact — that is, if there is no real dispute about any
12 fact that would affect the result of your case, the party who asked for summary
13 judgment is entitled to judgment as a matter of law, which will end your case.
14 When a party you are suing makes a motion for summary judgment that is
15 properly supported by declarations (or other sworn testimony), you cannot
16 simply rely on what your complaint says. Instead, you must set out specific
17 facts in declarations, depositions, answers to interrogatories, or authenticated
18 documents, as provided in Rule 56(e), that contradict the facts shown in the
19 defendants' declarations and documents and show that there is a genuine issue
20 of material fact for trial. If you do not submit your own evidence in opposition,
21 summary judgment, if appropriate, may be entered against you. If summary
22 judgment is granted in favor of defendants, your case will be dismissed and
23 there will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998)
24 (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil
25 Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party
26 opposing summary judgment must come forward with evidence showing triable
27 issues of material fact on every essential element of his claim). Plaintiff is
28 cautioned that failure to file an opposition to defendants' motion for summary
judgment may be deemed to be a consent by plaintiff to the granting of the
motion, and granting of judgment against plaintiff without a trial. *See Ghazali*
v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
F.3d 651, 653 (9th Cir. 1994).

4. Defendants shall file a reply brief no later than fifteen (15) days after
plaintiff's opposition is filed.

5. The motion shall be deemed submitted as of the date the reply brief is due. No
hearing will be held on the motion unless the Court so orders at a later date.

6. All communications by the plaintiff with the Court must be served on
defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
of the document to defendants or defendants' counsel.

7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

9. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs be given "notice of what is required of them in order to oppose" summary judgment motions at the time of filing of the motions, rather than when the court orders service of process or otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874 (9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when they file and serve any motion for summary judgment:**

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 962–63 (9th Cir. 1998).

11. Plaintiff's motion to file an amended complaint (Docket No. 32) is DENIED because it adds no new claims or defendants. The Clerk shall terminate Docket No. 32.

IT IS SO ORDERED.

DATED: November 26, 2012


RICHARD SEEBORG
United States District Judge

United States District Court
For the Northern District of California